Reform of the EU's Court System: Why a more accountable – not a larger – Court is the way forward

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1. The context

Recent media coverage of the EU Court of Justice suggests that the period of 'benign neglect by the powers that be and the mass media' – once described by Professor Eric Stein – may well be truly over once and for all. The most unexpected aspect of this rather unique level of media attention is that it does not directly concern any particular judicial ruling by a Court, which, since it decided its first case in 1954, has issued more than 28,000 judgments and orders. Instead, the Court of Justice (CJ) and its President, Mr Vassilios Skouris, have been subject to unprecedented media scrutiny following intense internal infighting about a contentious proposal which officially aims to 'reinforce the efficiency of justice at EU level' by doubling the number of judges working at the General Court (GC).

Before offering a review of the CJ's diagnosis and critically assessing the solutions defended by its President, it may be worth briefly recalling that the GC – initially known as the EU's Court of First Instance – was set up in 1989 to help the CJ cope with its increasing workload. To help in turn the GC cope with a similar issue, the first EU specialised 'judicial panel' was set up in 2005: Known as the EU Civil Service Tribunal (CST), the jurisdiction is exclusively limited to disputes between the EU and its civil servants and consists of 7 judges. By contrast, both the CJ and the GC currently consist of 28 judges, with one judge from each Member State. The CJ is however also assisted by nine Advocates-General.

1. The Court of Justice's diagnosis

The *casus belli*, which has prompted the current debate about the EU's judicial architecture, is the increase in the number of new cases brought before the GC (from 398 in 2000 to 912 in 2014); the stock of cases currently awaiting to be decided (1,423 in 2014 and expected to rise to 1,600 in 2015); and finally, the increasing number of actions for damages brought against the EU due to the excessive length of proceedings before the GC on the basis of Article 47 of the EU Charter, which guarantees a right to have cases heard within a reasonable time.

While increasing workload is not in itself a new phenomenon – and has indeed been a recurrent problem for both the CJ and the GC – the latter's growing workload has been seen as particularly worrying. Indeed, in addition to a rapid increase in the number of cases before it, the GC's productivity has decreased despite an increase in the number of both judges (due to the Union's enlargement) and their legal assistants known as *référendaires* (see however here for a recent update from four GC judges where it is submitted that 80% of the GC's backlog has now in fact been liquidated and that in the first four months of 2015, the number of completed cases exceeded the number of new cases filed).

In parallel to these distressing trends, the situation has begun to worsen as well with respect to the CST due to the rather childish inability of the Member States to fill two vacant slots since September 2014 – out of a total of seven as previously noted – following persistent disagreement about how the principle of rotation should be implemented.

1. The Court of Justice's latest solution

In 2011, the CJ initially refused to consider the creation of new specialised courts – a solution which at the time was favoured by the GC itself – and suggested instead the appointment of 12 extra judges at the GC. However, following persistent disagreements between the Member States on how to rotate the appointments between themselves, this preliminary solution was removed from a package of reforms to the Statute of the Court of Justice.

This led the President of the CJ to suggest last October the progressive doubling of the number of GC judges (from 28 to 56). However, to mitigate the economic burden engendered by the proposed doubling, the abolition of the CST was also suggested – with its seven judges expected to move to the GC – and a gradual implementation of the reforms, with an initial increase of 12 judges in 2015; a further increase of 7 in 2016 following the dissolution of the CST and the transfer of its case-load to the General Court; and finally, a last set of 9 additional judges to be appointed in 2019. The proposed abolition of the CST was something of a surprise as most observers consider it a success story and indeed, it has been presented as such by President Skouris himself on the occasion of its 5th Anniversary.

Be that as it may, the CJ's proposal would therefore 'only' result in the net creation of 21 extra judges, at an alleged net cost of €13.875m per year, assuming that there are 7 judges working at the CST in 2016. While this amount does not appear to take into account the €168m for the construction of a new tower, an expense which is however justified by the need to 'repatriate' staff who have been working in prefabricated buildings since 1999, the economic cost of the CJ's proposal may be viewed as relatively modest. One may for instance compare this estimated cost to the total amount of damages currently claimed against the EU on the basis of Article 47 of the EU Charter, i.e., €26.8 million. The economic importance of the cases heard by the GC is also such that the cost of the CJ's proposal is not a significant argument one may raise against it. We argue however that the solution put forward by the President of the CJ (and recently endorsed by the Council) is not adequate both from a structural and sustainability point of view.

1. Critical Assessment

As nicely summed up by our colleague Steve Peers, supporters of the CJ's solution have relied on the following arguments to support the proposal to progressively double the number of GC judges:

1. It would be a more flexible solution than the creation of specialised courts to the extent that litigation may increase in areas not initially foreseen and that cases most suitable for specialised courts tend to be repetitive and easy to deal with;
2. Keeping such cases closer to the CJ would also make sense considering that the CJ may have to deal with similar cases via national references for a preliminary ruling;
3. The appointment of new judges to the GC could be done swiftly and would also avoid any pork-barrel politics should the specialised courts not consist of a judge per Member State (as has been the case with the CST);
4. Finally, the CJ's solution would have the singular advantage of simplifying the EU judicial system.

These are sound arguments but unfortunately none of them are, in our view, empirically substantiated. The lack of any proper prospective impact assessment of the CJ's proposal is, in this respect, particularly regrettable. Similarly, one may deplore the top-down, not to say authoritarian, approach adopted by the President of the Court, which suggests a deliberate attempt to avoid any meaningful discussion of reasonable alternative proposals, such as the establishment of specialised courts with jurisdiction to hear and determine direct actions in a specific area. The CJ's proposal also marks a shift away from the principle of specialisation – endorsed by the Masters of the Treaties and set to materialise into the creation of subsequent specialised chambers, such as in trademark litigation (representing around 1/3 of the GC's workload) – towards a generalist jurisdiction made up of two judges per each Member State.

As for the argument raised against the principle of specialisation – to avoid creating a court with a 'rigid' jurisdiction that might not be justified in the light of future workload – well, the same argument could actually be invoked against the creation of a 'super-GC' whose future caseload is unlikely to double in the near future. This is especially true given the limited access to justice in direct actions currently granted by the Treaty as interpreted by the CJ. More critically, we submit that the doubling of GC judges is an unnecessary distraction from less visible and arguably more decisive issues such as case management and productivity per personnel unit. Those challenges, if tackled properly, would most likely bring long-lasting benefits to the institution without entailing a radical restructuring of the EU's judicial system.

We therefore propose to step back from what has become a largely emotive and not always evidence-based debate in order to gauge whether an alternative diagnosis and set of reforms should not be in order.

1. Thinking outside the dock

Although the dominant narrative accompanying this debate highlights the existence of a dramatic backload, there is a broader issue facing the ability of the GC to effectively deliver justice today.

We submit that the real difficulties encountered by the GC lie in the broader set of challenges faced by such a unique transnational and multilingual court whose jurisdiction has been growing in parallel to the transfer of competences to it since it was first established in 1989. It is important to realise that while the GC acts as an administrative court, invested with fact-finding tasks, the CJ largely operates as a constitutional court. These two courts, to oversimplify slightly, not only have jurisdiction over different kinds of cases but also hear actions originating from different actors. If the privileged client of the CJ is a national judge – largely embedded into its domestic reality – those of the GC are predominantly private business operators. Logically, therefore, the instruction of the cases should follow different operational guidelines and linguistic regime. Yet they largely don't and this is so despite the reform of the rules of procedure.

Let us illustrate why this assimilation of the two courts when it comes to their judicial organisation may explain several of the many challenges faced today by the GC.

In both courts, the instruction of a case is led by a Judge rapporteur (JR) nominated by the relevant President according to unknown criteria (even though specialisation would seem to be taken into account at times). He/she is expected, once the written procedure is terminated, to draft a preparatory, internal document (*rapport préalable)*. While the preparation of this working document by the JR requires on average two weeks at the CJ, it generally takes a minimum of 12 weeks at the GC (this is just an average: a trademark case might take significantly less and a competition law case significantly more). This is largely due to the fact that while the *rapport préalable* constitutes a few pages at the CJ, it generally consists of a fully-fledged document at the GC, which largely anticipates the draft judgment.

This difference itself reflects two different approaches: Unlike the CJ, where collegiality manifests itself on a weekly basis, allowing all Court members to exchange on the new cases that have reached maturity, the current operation of the GC shifts more responsibility to the chambers and in particular to the JR. In the absence of an Advocate General, the JR at the GC and his/her référendaire find themselves largely insulated from the rest of the Court and this for a significantly longer period of time. This situation – which is further exacerbated by the higher number of chambers – may mean a waste of precious time should the other members of the Chamber disagree with the approach developed by the JR in full autonomy over the previous months. A preliminary document stating the orientation of the chamber, to be agreed upon before the Judge Rapporteur and his/her legal assistant start working on the initial draft could be a promising area of reform. And this is only one of several areas where creative and low costs measures could be adopted to address some of today's concerns regarding the GC's workload. Other instances of reforms – which have largely remained taboo but would entail great savings – include a review of language arrangements (e.g. English could be used as a default procedural language in all competition or even 'economic' cases); a court fee to discourage vexatious or frivolous litigation; new rules on the allocation of legal costs for the losing applicant; a questioning of the automatic right of appeal, which would filter out, thus discourage, further and usually unsuccessful additional litigation initiated by wealthy parties, etc.

With respect to the judges themselves, we would wish to see the President of both the CJ and GC Courts as much concerned about quality than he is about quantity. Today, due to the concern generated by the backlog of cases before both the GC and the CJ, the metric of success of a judge has become the number of cases closed by each judge every year. Yet this ranking-based approach, which heavily relies on (internal) naming-and-shaming tools to induce judges to be more productive, has failed to deliver on its promises. This has largely to do, in our opinion, with the current external lack of transparency – and as a result, accountability – regarding inter alia the productivity of the members of the Court. This is not to say that the number of closed cases should be the alpha and omega of the Court's judicial policy. Indeed, we would advise a broader discussion of judges'

accountability during their terms with the view of identifying quantitative as well as qualitative performance benchmarks for judges and their cabinets to satisfy on a year-on-year basis.

More emphasis on the productivity of the members but measured in a less crude way may also produce positive effects on the selection of new members. In this context, it would be a good idea to 'europeanise' – de jure condito – the judicial selection process further. All Member States should be mandated to publish a public call, then to put forward a list of at least three candidates for each judicial position, selected on the basis of a number of additional obligations regarding gender balance, management skills and professional background of the applicants. A preferred candidate should then be indicated by the judicial panel provided for by Article 255 TFEU, which would take into due account the specific needs, in terms of specialisation, of the Court. A reform of this nature could help diversifying judicial selection while at the same time preventing any national epistemic communities, be it academia, the national judiciary or politics – from monopolising judicial recruitment at EU level. The term of the EU judges' mandate is another area ripe for reform and we would personally favour a single, non-renewable term of nine years, with a prohibition on any transfer of judges from the GC to the CJ during a judge's term to avoid disruptions.

Closely linked to the issue discussed above is another sensitive one: the recruitment and supervision of support staff. With a view to improving both quality and productivity, we would prioritise a review of the feudal rules that currently govern the recruitment and management of référendaires, i.e. the EU judges' legal secretaries. In a few words, we would favour the organisation of a regular civil service exam for the whole CJEU to guarantee a common core of knowledge in a number of areas; the adoption of updated and uniform entry requirements (e.g. candidates should be qualified to practice law or have taught law full time at university level for a minimum number of years); and the creation of a pool of qualified candidates (or two pools with a junior and a senior stream) from which judges could select their teams of legal secretaries who will be automatically appointed and retained for the duration of the relevant judge's term as long as clear and pre-defined performance targets are met. To promote best practices, compulsory and regular attendance at management (for judges) and legal drafting (for legal secretaries) courses could be required. To favour stability and move away from the current medieval arrangements, the legal assistants should no longer be contractually linked to a particular judge but to the Court. It would also be a good idea to introduce on the one hand, some basic elements of modern employment law such as the EU rules that prohibit discrimination, and on the other hand, internal whistleblowing rules as suggested by the European Ombudsman in January 2014. Finally, to help EU judges and their cabinets deal with unusually complex and/or time-consuming cases, an additional, centralised pool of highly qualified legal secretaries in sub-specialised areas of EU Law (e.g. EU taxation law) could be set up and its members be 'seconded' on a case-by-case basis to relevant cabinets. A similar experience gained by the GC in its early days has been – according to many – very positive.

1. Looking beyond the workload challenge

Contrary to the dominant narrative, we argued above that the real challenge facing the Court today is more qualitative than quantitative in nature. We would therefore tend to agree with the view defended by a number of EU judges that the proposal to double the number of GC judges is 'yesterday's solution for yesterday's problem'. Rather than exclusively focusing on the GC and its allegedly excessive backlog of cases, we would welcome a broader reflection in the context of a more evidence-based and inclusive framework. The urgent question today is how to ensure that the CJEU will remain an authoritative institution delivering readable, prompt and cogent rulings in a unique multicultural, multilingual and multi-legal context.

As is often the case in life, what makes the difference is the human factor. The CJEU is no exception. The solution to many of its challenges depends more on its understanding of human nature than the law. One may hope that the CJ's new President will prove more willing to embrace a subtler understanding of the many dynamics operating within a judicial body and more proactive than reactive when it comes to judicial reform. In our view, a better system of incentives, a wiser use of psychological insights (e.g. peer-pressure), and most fundamentally, a more open court, promise more than the proposed mechanical addition of more judges. Reforms of this nature would render the Court more accountable to the outside world and enhance, as a result, its legitimacy and authority at what is a very difficult juncture for the European project.

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